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IN THE

Supreme Court of the United States

October Term, 1967
No. 487

THE AMERICANA CORPORATION, a corporation,
Petitioner,

vs.

EDWARD A. HABER, ROBERT H. MOEN, RONALD P. TAMILLO, JOHN WINNING and ROBERT SISSON,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Introduction.

This case presents no special and important reason why it should be heard by this Court. Its significance is largely confined to the facts and is of importance only to the parties. The decision of the Court of Appeals below, coupled with the record, clearly reveals that no significant questions have been left unanswered and no departure from judicial standards has been made. Accordingly, a grant of certiorari would not be warranted.

Opinion Below.

The opinion of the Court of Appeals (Pet. App. 1, *et seq.*) is reported at 378 F. 2d 854.

Statutes and Regulations Involved.

Respondents concur in Petitioner's statement regarding the pertinence of the Fair Labor Standards Act and the regulations promulgated by the Department of Labor thereunder. Respondents dispute, however, the pertinency to this case of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Statement of the Case.

During the periods here involved, respondents Haber, Tamillo and Winning were employed by Petitioner, publisher of the Encyclopedia Americana and related works, in the credit and collection department of its Beverly Hills office.* The primary tasks performed by these respondents were as follows: *First,* they attempted to collect delinquent accounts by telephone. This required delivery of a set, routine, predetermined speech asking customers for payment [see, *e.g.,* Rep. Tr. 382-383]. After the demand was made the account card would be placed back into a bin to be picked up by another collector the next month [Rep. Tr. 185-187; 230-231]. *Second,* they verified orders and checked credit. This task, performed by telephone men and office girls as well [*e.g.,* Rep. Tr. 53, 1056], required filling in the blanks on the back of sales contracts [Rep. Tr. 231, 323]. It required calling the customer to be sure he

*These Respondents were given by Petitioner the informal job title or designation "area supervisors" this is of course of no significance in determining the applicability of the exemption, 29 C.F.R. §541.99(c); 29 C.F.R. §541.201(b); *George Lawley & Son Corp. v. South,* 140 F. 2d 439 (1 Cir.), cert. den. 302 U.S. 746.

wanted to books, and then calling the customer's credit references to ask what their experience with him had been [Rep. Tr. 232, 233]. Any derogatory information was forwarded to the collection manager for final disposition [Rep. Tr. 175, 233, 393, 412, 588], and he often rejected their recommendations [Rep. Tr. 52, 412, 414, 588]. *Third,* they helped in the function of entering payments in the activity or collection book. This consisted of sorting thousands of coupons which had come in with payments to the cashier's office, sifting out those that were for delinquent accounts, and then making a notation of payment [Rep. Tr. 56, 162]. *Fourth,* to a limited extent, they were involved in correspondence work. This involved principally designating which of a number of available form letters should go out in connection with collections—the decision being governed by written instructions [Rep. Tr. 239-240]. They also handled complaint letters (as did the "correspondence girls") [Rep. Tr. 585, 1042]; but all serious complaint letters, such as those involving the Better Business Bureau or the Federal Trade Commission, were referred directly to the collection manager [Rep. Tr. 238, 272, 586, but see, 1031, 1049]. The collection manager had an assistant who was on a level above the area supervisors and who merely "accumulated problems" and referred all important ones concerning credit or cancellation of contracts to his boss [Rep. Tr. 421, 431]. The credit and collection department had no direct relation to policy making, and, except in its narrow field, nothing to do with execution of company policy [Rep. Tr. 778, see also 770-4].

The District Court held that these Respondents were administratively exempt under Section 13(a)(1) of the Fair Labor Standards Act as defined and delineated in 29 C.F.R. Section 541.2 [Clk. Tr. 230].

The Court of Appeals reversed, holding that they were not employed in an "administrative capacity", and remanded with instructions to determine the amount of overtime worked by Respondents and the compensation due them. The Court of Appeals specifically held that "the function of collecting accounts" was nonadministrative (Pet. App. 4, 5, 12; 268 F. 2d 856, 857, 858].*

*Petitioner apparently does not seek review of the decisions of the Court of Appeals respecting the named Respondents other than Messrs, Haber, Tamillo and Winning, the so-called "area supervisors" (Pet. 7).

ARGUMENT.

I.

The Decision of the Court of Appeals Is Consonant With Applicable Decisions of This Court and With Accepted Judicial Proceedings.

This Court has held that the Fair Labor Standards Act is a remedial act [*United States v. Darby,* 312 U.S. 100] and that it must be liberally construed so as to effectuate its purposes [*Mitchell v. Lublin, McGaughy & Associates,* 358 U.S. 207; *Mitchell v. Vollmer and Company,* 349 U.S. 427]. Consequently, the over-riding policy is narrowly to construe against an employer the application of the exemptions [*Arnold v. Kanowsky,* 361 U.S. 388].

Before an employee can be denied the benefit of the Act, his employer has the burden of proving that each and every applicable condition set forth in the exempting regulation is fulfilled [*Walling v. General Industires Co.,* 330 U.S. 545.]

The court below noted that one of the criteria that must be met under the administrative exemption of 29 U.S.C. Section 213(a)(1) is that no more than 20 per cent of the employees' time be spent in non-administrative work [29 C.F.R. §541.2(d)]. It stated:

> "There is no evidence brought to our attention of compliance with this requirement. Indeed, the only evidence is to the contrary. Appellant Haber testified that about sixty per cent of his time was spent in the nonadministrative function of collecting accounts. (R.T. p. 51.) Ronald Tamillo estimated about eighty per cent of his time was spent on telephone collections or dealing with mer-

chandise. (R.T. p. 589.) Winning estimated that fifty per cent of his time was spent as a telephone collector. (R.T. p. 159.)

"In sum, the only evidence as to compliance with 29 C.F.R. § 541.2(d) is that there was no compliance. The court's conclusion that Haber, Ronald Tamillo and Winning were employed in an 'administrative capacity' is erroneous and must be reversed." (Pet. App. 5; 378 F. 2d at 857).

The testimony cited by the Court of Appeals relating to the percentages of time spent in performing non-administrative functions is the only such testimony in the record. Even if there were some evidence to support the conclusion of the District Judge, it was properly held "clearly erroneous" where the reviewing court on the entire evidence was left with the definite and firm conviction that a mistake had been committed. [*United States v. United States Gypsum Co.*, 333 U.S. 364].

II.

The Decision of the Court of Appeals Presents No Important Questions of Federal Law.

Petitioner contends that since the Court of Appeals concluded that the function of collecting accounts was non-administrative, it overlooked the provision in 29 C.F.R. Section 541.2(d) that activities which are "directly and closely related" to the performance of the work described in paragraphs (a) through (c) of Section 541.2 also qualify as exempt. Petitioner attempts to support this by stating that the Respondents' work involved executive functions and that the District Court had a "clear feeling" that, for these Respondents, col-

lecting was administrative work. While the statement of the Court of Appeals that no more than 20 per cent of the employees' time can be spent in nonadministrative work to qualify under Section 541.2(d) is not in the exact language of the regulation, there can be no presumption that the Court overlooked any of the requirements therein, and, furthermore, the record itself could not support the proposition that these Respondents' collecting activities were directly and closely related to administrative functions. The District Court concluded that the administrative, not a combination exemption applied [Clk. Tr. 230].

Respondents do not contest the proposition that an employee may be exempt if he performs a combination of administrative and executive work, but the record does not admit of such a finding. The work performed by Respondents did not consist of the "management of the enterprise" in which they were employed or of a "customarily recognized department or subdivision thereof" [29 C.F.R. § 541.1(a)]. Furthermore, in view of the minimal discretion and authority exercised by the assistant collection manager [Rep. Tr. 431] it would be illogical to conclude that these Respondents, who operated on a level beneath the assistant collection manager, had executive functions.

Petitioner also asserts that since 29 C.F.R. Section 541.2 applies to this case as it existed during the periods of employment in question, it necessarily follows that Respondents' work should be judged under the proviso to that section which required, during the time periods in question, only a salary or fee basis of pay at the rate of not less than $125.00 per week, rather than $150.00. Neither the District Court nor the Court

of Appeals applied the shorter test of the proviso. There is no indication that either court applied Section 541.2 except as it appeared during the periods of employment in question.

Even if it be assumed for purposes of argument that the proviso to 29 C.F.R. Section 541.2 did apply, no different result could possibly be forthcoming. The Court of Appeals has concluded that the collection activities of Respondents were nonadministrative. It has cited the only evidence in the record relating to the percentages of time the Respondents spent in performing this function. The proviso to 29 C.F.R. Section 541.2 requires essentially what is outlined in paragraphs (a) and (b); namely, that the employee's "primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer . . .," which includes work requiring "the exercise of discretion and independent judgment . . ."

While time alone is not the sole determinant of primary duty, "In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 per cent, of the employees' time." [29 C.F.R. § 541.103].

The facts found by the Court of Appeals concerning nonadministrative collection duties as being primary, sufficiently appear in its opinion to support the judgment it has entered. [*Levenson v. Spector Motor Service,* 389 Ill. 466, 59 N.E. 2d. 817, aff'd. 330 U.S. 649.]

Throughout its Petition, Petitioner argues that the Court of Appeals reversed the District Court on the "sole ground" that 29 C.F.R. Section 541.2(d) was

not complied with. A fair reading of the decision, however, shows that a factual determination was made by the Court of Appeals that collecting accounts was "nonadministrative". Hence, there can be no doubt that even if the Court of Appeals relied upon the wrong section in the regulations, the reasoning underlying its decision was that nonadministrative functions comprised the primary duties of Respondents. A decision reaching a correct result should be sustained even though based on an erroneous reason [*Montana-Dakota Utilities Co. v. Northwestern Public Service Company*, 341 U.S. 246].

Conclusion.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

HOWARD I. FRIEDMAN,
Attorney for Respondents.

LOEB AND LOEB,
ROBERT A. HOLTZMAN,
ALAN V. FRIEDMAN,
Of Counsel.